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ABSTRACT

Through a review of two accelerating trends in the technology of producing and distributing information and entertainment, this paper argues that the promises of "the information economy" and the "television of abundance" bring not the emancipation of diversity and access, but the rapid disintegration of an already weakened right to privacy at the same time that they threaten the very foundations of participatory democracy. After examining various emerging technologies for the delivery of video program services, the paper explores the dramatically improved technology for combining information from a variety of diverse sources to construct models of audience segments, which are then used for the delivery of specially tailored promotional or persuasive messages. It contends that privacy law, as well as regulations agreed to as part of cable franchise agreements are inadequate because of their limited scope. It argues also that while the increase in public concern with privacy is positive, the tendency to limit privacy protections to "individually identifiable information" ignores trends in the media environment where individuals are targeted as members of purposely constructed groups or segments. The paper concludes that democracy itself is threatened by a further dislocation of access, redress, and individual control from the local political community. (Author/FL)

TECHNOLOGY, PRIVACY AND THE DEMOCRATIC PROCESS

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Technology, Privacy and the Democratic Process

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ABSTRACT

It is the responsibility of critical scholarship to make the commonplace controversial, to point out the unexpected, often undesirable consequences of decisions made in warmth of blue sky optimism. This paper proposes to do just that. It reviews two accelerating trends in the technology of producing and distributing information and entertainment; it argues that the promises of "the information economy" and the "television of abundance" brings not the emancipation of diversity and access, but the rapid disintegration of an already weekened right to privacy at the same time that it threatens the very foundations of participatory democracy.

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Background

Romain Laufer (1981) characterizes this current period of transition as a moment of ideological crisis for liberal democratic societies. Liberal values are seen to be threatened when the relative power of individuals and bureaucratic

organizations becomes increasingly unequal. Inequality in size and resources is associated quite naturally with inequalities in power. For Laufer, an immediately apparent reflection of this inequality can be found in the loss of individual autonomy as the privacy of individual consciousness is broached:

> After accumulating information on the isolated individual, the organization has a tendency to encroach on what was the inner man. Information processing as the medium for files and their handling seems to participate in this attack on the individual (1981, p. 234).

Similar concerns are expressed by Stanford psychologist, Philip Zimbardo:

> A powerful differential emerges in which unknown others have information about the individual; this inequitable distribution of information reduces the person's sense of personal autonomy and inspires feelings of powerlessness (1983, p. 61).

While at one level sharing these concerns for privacy as a right and value in itself, other observers of the contemporary scene are concerned with the instrumental uses of information that contribute to the maintenance of inequitable social relations. Oscar Gandy (1982) describes the uses of mass media to deliver information subsidies to participants in the public policy process so as to influence the outcomes of public debates. Those with greater resources, generally those in bureaucratic organizations, tend to dominate the policy process because of their ability to set public agendas and provide most of the information upon which debates are decided.

Others, like Vincent Mosco (1982) and Philip Elliot (1983) suggest that the public sphere itself is being transformed by changes in the information media. Public debates are seen to be illusory, and public opinion a misnomer because there is no longer any genuine public debate, only the mobilization or manufacture of public sentiment. Emerging technologies like teletext only "serve to strengthen the illusion of public opinion by giving individuals the feeling of participation" while in fact, "the advance in the number of participants is at the expense of the quality of participation" (Mosco, 1982, p. 110).

Participation through electronic media is identified with the tendency toward the loss of basic social interaction:

> By concentrating activities within the home, the broadcast media of radio and television set up a type of human group which has no other connection with each other than their common use of the service...it deprives them of the opportunities for association in which common needs might be recognized and demands formulated (Elliot, 1983, p. 571).

In contrast with those who see the new information technologies as harbingers of a renewed democratic possibility (Horowitz, 1983) most of the critics of new media see the "direct democracy" promised by interactive systems in much more sanguine terms. In general, the view is that participation in voting without the benefit of prior debate, even responding to opinion polls without "full-scale presentation of positions and facts, expression of preference without a sense of the public context of choice, all do more to undermine democracy than to reinforce it" (Barber, 1983, p. 62).

Behind the concern for the transformation of the democratic process is a specific emphasis on a process of manipulation which is made all the more accurate or efficient through increased bureaucratic access to information about the public from a variety of sources, combined with remarkable advances in techniques for combining this information in ways impossible before the widespread use of high speed computers. This paper will focus on changes in systems for the delivery of targeted communications to narrowly defined segments of the population.

Delivery Systems

Despite the present instability within the cable television market, it is generally believed that by 1990 we will find that penetration has reached 60% of the U.S. population, with nearly 75% of those homes opting for some form of pay service (Poltrack, 1983). While there is likely to some competition within categories, David Poltrack suggests that there will be eight basic cable

networks covering approximately the same broad interests in the magazine field (news, culture, adult entertainment, sports, women's services, fashion and style, shelter and business).

There is no reason to believe that the current success of children's or family programming, or the apparent support for religious programming should decline within the decade. Although strictly religious programming represents only about 40% of their current cable fare, the Christian Broadcasting Network is currently the third largest cable network behind ESPN and Ted Turner's superstation, WTBS (Mayer, 1984). Although not yet profitable, Warner Amex's Music Television (MTV) is the most successful of the cable networks which have self-consciously focused on a relatively narrow segment of the potential viewing audience (Metz, 1983). The more spectacular failures of those cable networks aimed at the lucrative upscale audience may be seen in part to be a failure of planning. The Bravo network, while still losing money in 1983 at the rate of $1.5 million per year, seems to be an unqualified success when compared with the short-lived Entertainment Channel which folded after losing $34 million in nine months (Knoll, 1984).

The present failure of cable to win the trust of the advertising community is in part a problem of measurement. Traditional diary methods substantially undercount cable viewing, especially in systems where there are twenty or more channels for viewers to recall. The advent of more reliable measurement, combined with the economic pressures of rising fees for broadcast time, will, in the view of many analysts, lead to renewed interest in cable advertising. And, while it is unlikely that the 120-140 channels in some of the newer urban cable systems will ever be filled with unduplicated material, it is believed that substantial profits will be available for special audience networks with only 1 and 2 share ratings.

Direct Broadcast Satellite Television (DBS), already witnessing some fallout due to the tremendous start-up costs, may in the future be the primary force leading cable to move closer to its initial promise of service to specialized audiences. With initial plans for five channel services, DBS is technically suited for direct competition with broadcast television for the audiences for mass appeal programming, and for the support of general market advertisers (2001, 1982). With higher power satellites operating in the 12/14 GHz frequencies, smaller antennas will increase the attractiveness of direct to home entertainment services.

In terms of more highly specialized information services, videotext systems represent the penultimate in delivery systems. While introductory services are necessarily aimed at wealthy upscale audiences (Knight-Ridder, 1983) (in the absence of government subsidies to provide terminals to all, as proposed in France) the potential for telephone or cable interconnection with high capacity databases for access to news, market or consumer information, interactive entertainment or education, will eventually be extended to a broad segment of the U.S. population. Sixty-eight percent of the experts polled in the Delphi survey by Joseph Pelton (1981) felt that by the year 2,000, at least 25% of the homes in the U.S. would have access to a computer/communications/video center for entertainment, education, shopping, research, etc. Seventy percent felt that teletext would be in 5-10% of American homes by the same time.

However, because broad-based access to videotext systems is not likely before the end of the century, our concerns with the threats to democracy will be directed toward those technologies which already have an established presence.

Audience Segmentation and Targeting

The promise of cable, teletext, and even DBS is in their potential for the delivery of multiple channels of information and entertainment to audiences

with diverse tastes and preferences. This is the television of abundance which is anxiously awaited by those whose minority interests are currently underserved by systems catering to the golden mean. This same diversity is also sought by liberal adherents to pluralist expectations which do not bleed easily into visions of Babel and enthnocentricism (Barber, 1983; Gitlin, 1981).

These new systems have not only increased the number of discrete channels entering the home, but digital addressability makes it possible to selectively include or exclude different households from the audience from a particular program at the same time that they are able to interrogate home receivers to determine which offerings, if any, are being viewed (Baldwin and McVoy, 1983). It is this potential which is held in the highest regard by those whose financial interests are most closely entwined with this media enterprise. Multiple channels with addressability and verifiability together represent the essential components of what promises to be the most powerful marketing tool ever imagined. It is this same potential which makes us so apprehensive. Even normally conservative analysts like Ronald Berman indicate some reservations about marketing as "there is a dark side to advertising, for it is willing to do anything not specifically prohibited by law or restrained, momentarily, by ethos (Berman, 1981).

Once market research has identified individuals , or economic units like households as "prime targets," more or less likely to respond favorably to a particular promotional appeal, addressability allows the delivery of that message without unnecessary waste (Percy and Rossiter, 1980). But, it is the same two-way capacity of these emergent systems which also facilitates the identification of target audiences in the first place. Information about interests, opinions, recreational activities, tastes and preferences in food and fashion as well as the familiar demographic indicators of age, life cycle, race, and class make possible the construction of detailed market segments

(Frank, et. al., 1972). All of this information is likely to be available at any moment within the head end computers of the modern cable system. And, as Lewis Auerbach (1983) warns:

> such master profiles will be of great market value: if allowed to be sold or exchanged by the same consumer system, they will make the present mailing list and credit bureau data exchanges seem like nursery school activity (p. 35).

Segmentation analysis has advanced significantly in recent years, and even without the information which is likely to be collected by the full-service cable system, highly detailed profiles of consumers or members of the electorate are produced each day by a variety of research firms. Analysts utilize a variety of scaling techniques, multiple discriminant analysis, multidimensional scaling (MDS), factor analysis, or weighted covariance to identify groups or clusters of individuals who have similar weights or underlying theoretical dimensions, such as a willingness to struggle with difficult intellectual material (Meyers and Tauber, 1977). The data used in developing these clusters or market segments is usually generated by paid market research involving voluntary completion of questionnaires. Occasionally, deception is used to get around the bias researchers believe accompanies respondent "awareness of being tested" (Bedell, 1981).

More recently, however, much of the data being utilized in the construction of market segments is derived from datasets initially developed for quite different purposes. The 1980 Census, for example, has served as something of a windfall for those firms which provide segmentation analyses commercially. Claritas Corporation, a leader in geo-demographic segmentation which offers a variety of special analyses, utilizes census data, along with a variety of public records (automobile registrations, voting records, housing purchases and transfers, etc.) to identify approximately 40 different "community types", and to locate those types in approximately 217,000 census blocks around the U.S.

(Clusters, 1982). With names indicating the socioeconomic character of the neighbors, Claritas informs clients that "Blue Blood" neighborhoods contain only 6% of the population, but they account for 60% of the corporate stock. A competitor, Donnely Marketing, identifies 47 neighborhood types from census data; but with information provided by the Simmons Research group from its survey of 19,000 consumers, detailed information on some 73 million households, including media use and purchases of some 750 produce categories is combined into detailed consumer profiles (Gupta, 1983).

In addition to the comprehensive data provided by Simmons, A.C. Nielsen's expanded metered sample makes possible the provision of N/NPAR, or Nielsen Product/Audience reports tailored for individual markets which profiles each station in the market by daypart and audience purchases of some 59 major product classes (Nielsen, 1983).

Some of the most sophisticated segmentation research is made possible by cable addressability and computer scanning of the universal product codes (UPC) on virtually every product in the supermarket. One leading firm, Information Resources Incorporated (IRI) offers a service called Behaviorscan. Consumers participate in the datagathering because they believe that their purchases are a direct communication to the manufacturer. In several test markets, chosen for their demographic match with the broader national market, some 2,500 households provide detailed information about their families. In addition, they agree to use a coded identification card each time they shop in participating supermarkets equipped with UPC scanners. What they are told, but soon forget is that the television commercials they will see when they watch their cable supplied programs may not be the same commercials their neighbors see. Indeed, the Behaviorscan system makes possible the approximation of true experimental conditions for the test of commercials. In one houshold, viewers of Magnum, P.I. may see a commercial for cookies which underscores the moistness or the

aroma, while the next door neighbors might see a commercial for the same cookies which highlights the number of chocolate chips. The next time they shop, their purchases are recorded and transmitted to IRI, and provide the basis for evaluating the success of a particular appeal with a particular audience segment, within the context of a particular editorial environment (Schumer, 1983; Hulin-Salkin, 1983; Poindexter, 1983).

The potential of such a technology is made clear in the words of an IRI executive:

> Someday we could identify the different demographic segments and when the commercial break comes on, we send the high income group a high income type of ad. It would be direct mail for broadcast (Schumer, 1983, p. 74).

After reviewing several scanner studies, Joseph Poindexter (1983) wondered:

> If our daily purchases can come under the unblinking gaze of some omniscient electronic presence that can also shape our behavior by manipulating what we see on our television sets, what about the rest of our personal affairs (p. 67).

To the extent that we still have some personal connection with the political system, it is clear that this arena is unlikely to be spared the twin technologies of segmentation and targeting.

The Political Sphere

David Chagall provides numerous detailed examples of efforts by a new breed of political consultants to utilize segmentation and targeting techniques to win elections and tip the balance of public sentiment toward favored positions on referendum issues (Chagall, 1981). One important quality of targeted communications is their potential for concentrating efforts on political targets with the greatest potential, while ignoring those which represent the greatest risk in opposition. Matt Reese, a leader among political consultants, recently described his success in overcomin tremendous odds through the use of targeted

communications (Communication, 1984) in the "quite media."

For Reese, the quiet media are the mails, the phone, and door-to-door solicitation. The quiet media are most useful in those situations when the favored position is outnumbered in the general population. Such was the case in the Missouri campaign against "right to work" legislation in 1978. Reese reports that preliminary surveys revealed that 60% of the population were in favor of the legislation, but by quietly targeting the 40% likely to vote against the bill, Reese and his colleagues were able to prevail on election day with approximately 60% of those voting going against "right to work." When asked about the ethics of his let sleeping dogs lie policy, which actually subverted the public will as he knew it, Reese responded that because the opponents didn't use their money wisely, he "didn't know of anywhere in the constitution that said to reward stupidity."

William Viguerie, segmentation and targeting specialist for conservative political causes has a similar view of the power and appropriateness of targeted communications;

> The interesting thing about direct mail is that when it's professionally done, it has a devastating impact. It's like having a water moccasin for a watchdog--it's very quiet (Young, 1982, p. 146).

While Reese and Viguerie are not very concerned with the implications of such involvement in the political process, members of the Senate Committee on Government Operations were concerned enough recently to schedule hearings on lobbying efforts using similar methods to influence grass roots participation. Some witnesses, such as Robert Smith, president of Targeted Communications, appeared proud of their role in grass roots lobbying efforts:

> Recent developments in computer technology have permitted the identification of the demographic and psychographic information which uniquely defines each individual. Further, this new technology has made possible the storing and sorting of that information on millions of individuals at a relatively

> low cost. The advances in printing, notably laser printing, permit the large scale production of highly personalized communications to those individuals.
>
> Political organizing is now taking place at home through direct response soon it will be conducted through computer terminals and television sets (Smith, 1983).

Testimony from Fred Wertheimer (1983) of Common Cause suggested that "members (of Congress) should know the source of political pressure, and the amount spent to generate that pressure, in order to evaluate it," (p.9) but the political consultants saw the technology as tools of the trade and legislators as fair game. Frank Tobe, described as "one of the leaders in computer technology as it relates to voter files, targeting and computer-prepared direct mail," told an audience of politial activists about laser printers that were capable of generating highly specialized letters at the rate of 7,000 per hour. These letters could be generated with personalized headings and typefonts so that legislators would be less likely to identify computer-generated mail as having come from an organized campaign (Tobe, 1984). At the present time, such direct information subsidies (Gandy, 1982) are most effective when delivered through the mail, although specialized periodicals provide for some degree of targeting. With improvements in audience measurement, such as that now available from Nielsen, or the "people meters" proposed by Audits of Great Britain (Hulin-Salkin, 1983) it should be possible to target rather finely defined segments using existing broadcast media. Our concern, of course is to determine if there is any way to stop this trend.

Datagathering and Privacy

The overriding concern here is with the unavoidable "trails" we leave as we make our way across the electronic landscape. Alan Westin identified the potential for increased surveillance as early as 1967:

> As we are forced more and more each day to leave documentary fingerprints and footprints behind us, and as these are increasingly put into storage by systems capable of computer retrieval, government may acquire a power--through data-position that armies of government investigators could not create in past eras (Westin, 1967).

James Rule and his associates (1980) suggest that the process of accretion which results in the loss of our privacy rights is so slow that public awareness of the issues is blunted. People have become only slightly more concerned about the amount of information they provide to government and corporate surveys and questionnaires (Harris and Westin, 1981). Some list builders take advantage of the trusting nature of most Americans, and utilize the services of Western Union to solicit personal and corporate data, because most people assume that Western Union has a "right to know" such information (Hodgson, 1980).

It is only recently that people are recognizing the variety of ways that profiles can be constructed from disparate parts of their day-to-day activities. The District of Columbia People's Council, Brian Lederer, raised questions about the proposed "measured unit service" where local calls would be recorded so subscribers could check the accuracy of their bills. Lederer noted that:

> Who you call gives someone more information about your business, social, political and religious affiliations than any other piece of information. All of our constitutional liberties are lost once somebody gets a hold of those records (Isikoff, 1983, p. 1).

Similar concerns are expressed with regard to the myriad of transactions made electronically with a computer-based electronic funds transfer (EFT) system:

> The information that shuttles through an EFT system is truly explosive; it can reveal a pattern of a person's

> movements in a day, a pattern of purchases, habits and expenditures, preferred products or merchants, preferred charitable or religious causes, travel habits, or even transactions that members of a family are trying to conceal from one another (Nash and Smith, 1981, p. 13).

While there are some efforts to provide protections against threats of individual privacy rights, there is also evidence that there are more resistant threats aimed at members of specific groups. In describing government efforts to identify potential cases of fraud, the government is described as invading the privacy of "classes" of people:

> A computer match is not bound by these limitations. It is directed not at an individual, but at an entire category of persons--not because any one of them is suspected of misconduct, but only because the category is of interest to the government. What makes computer matching so fundamentally different from a conventional investigation is that its very purpose is to generate the evidence of wrongdoing that is necessary before a conventional investigation can be initiated (Shattuck, 1982).

Scott Boorman and Paul Levitt argue that some classifications generated on the basis of transactions and relationships are such that claims to privacy are largely irrelevant:

> This is because block modeling classifies people on the basis of where they fit in a larger web of relationships. Therefore one has to be concerned with many more "files" than just one's own--some belongings to people noone has connections with.
>
> In contrast to abuses like "redlining" or race, sex or age discrimination, the new technologies frequently pick out less than obvious groups where members may easily fail to recognize they are being targeted in common (Boorman and Levitt, 1983, p. F3).

The Protection of Privacy

At the same time that technical developments are making the invasion of privacy less difficult, and the economics of competitive markets are making such information more valuable, protections within the legal system are wearing

legislative and judicial developments in the privacy area in recent years have compromised privacy rights after appearing at first to protect them" (Shattuck, 1983).

While at one point it appeared that the battle had been won in Congress to stop the creation of a comprehensive national databank, and the use of the social security number as a personal identification number, and the card itself as a domestic passport, we now find the social security number used by federal, state, local and private concerns (U.S. Congress, House, 1982). At the same time, we find that separate public and private databases are being merged in automatic matching programs (U.S. Congress, Senate, 1982) such that, in Shattuck's words, "unregulated computer-matching at all levels of government has created a de facto National Databank" (Shattuck, 1983, pp. 5-6).

The battle against warrantless bugging and wiretapping was thought to have been won in the Supreme Court in the late 1960s, but this led to a new federal statute which authorized various forms of surveillance (Omnibus, 1968). In the post-Watergate era, we find an expansion of wiretap possibilities through the new Intelligence Court which seldom denies subpoenas to an agent requesting to conduct surveillance on Americans or foreign nationals (Simmons, 1981). Where we have lost ground in the battle against federal surveillance, the first blow has barely been struck in the battle against corporate invasions and abuses of privacy.

The Fair Credit Reporting Act, is characterized by Arthur R. Miller (1971) as "an act to protect credit bureaus against citizens who have been abused by erroneous credit and investigative information." He was initially pleased with the prospects suggested by the bill offered by Senator Proxmire in 1969, especially with those features of the bill which would require "credit information to be withheld from non-creditors, such as governmental investigatory agencies, without the express consent of the person involved" (Miller, 1971, p. 85). However,

Miller was soon to be surprised by what emerged:

> The original Proxmire Bill had been butchered; it was drawn and quartered and its vitals were left on the committee's chopping block. How that came to pass is no mystery. Industry lobbyists and bank-oriented senators engaged in the dissection, while advocates of consumer protection quietly relied on the legislative process to produce a bill that would respond to the needs of the

In its final form, the bill allowed access to market researchers, detective agencies, lawyers and various groups. The final Act does grant access and notice of adverse reports, and restricts investigative reporting somewhat, but it still does not properly define who should have access to a subject's file, nor does it sufficiently limit the length of time material should be retained.

The credit industry argues that the Guidelines developed later do provide the proper protections of consumer privacy. However, in Miller's view, these guidelines were developed by "an industry group that had only minimal consumer representation, are not binding on anyone, and are bountifully endowed with loopholes (p. 89). The guidelines allow agencies to collect information from public files--bankruptcies, lawsuits, arrests, indictments or convictions of crimes--but they do not obligate those same agencies to make more than a "resonable effort" to learn about and report the disposition of these items.

A serious threat to privacy lies in the fact that computerized databanks are continually used for purposes other than those for which they are created. Social Security Administration files are now used to identify illegal aliens, the Federal Parent Locator service uses those files to identify and pursue parents who are delinquent in their child support payments, states now allow employers to use the criminal history databanks originally designed for police use. The IRS databanks are now used to screen prospective jurors, and the uses to which Census data have been put are legion, including the identification of

Japanese Americans so as to facilitate their movement into internment camps during World War II (Flaherty, 1979).

What we thought were the protections of the Privacy Act of 1974, turn out in fact to be empty promises because the law is riddled with eleven exceptions. Without these exceptions, the law prohibits federal government offices from disclosing personal information without the written consent of the individual. The exceptions to the protection includes disclosure to (1) officers and employers of the agency in the performance of their duties; (2) when required by statute; (3) for routine use; (4) to the Census Bureau; (5) for statistical research (6) to the National Archives; (7) for a civil or criminal law proceeding; (8) to protect an individual's health and safety; (9) to Congress; (10) to the Comptroller General; and (11) pursuant to court order. In essence, the only exception that is not included is one for the news media.

According to John Shatuck, the "routine use" exception is the route most frequently taken in providing justification for computer matching of government and private databases (Shattuck, 1983).

Privacy and the States

When we review the record of the Federal Government's use of publicly held records, and the tactics it has used to gain access to a great variety of privately held records, we have little reason to expect federal legislative efforts to erect any meaningful protections for data stored within the computers of interactive cable systems. Gary Selvin (1982) suggests that there is a substantial difference in the way that federal and state courts have interpreted privacy rights with regard to financial records, and the records of communications, such as telephone calls recorded by pin registers. Arguing that transactions between subscriber and cable operator are similar to those between bank and

customer, Selvin suggests that California's strict requirements for government access to financial records should be expected to extend to cable records as well. Similarly, California has held that "a customer has the same expectation of privacy for telephone numbers dialed as he has for banking records" (p. 789). While the Electronic Funds Transfer Act of 1978, the Right to Financial Privacy Act of 1978, and the Tax Reform Act of 1976 would appear to offer similarly framed expectations of privacy, our experience with federal interpretations of "reasonableness", leads us to favor the trends in the progressive states like California.

Ten states have enacted the Model Law of the National Association of Insurance Commissioners (see, e.g. California Insurance Code 791) which requires insurers to inform customers about transactions involving their personal data. The Act also requires specific notice when the disclosure is requested for marketing purposes, and restricts "pretext interviews" by deception. If information is collected from friends, neighbors or associates, a notice is required as well as the opportunity to access and correct certain information, but not all. The Act allows civil and criminal lawsuits in addition to injunctions by the state insurance commissioner.

In general, privacy legislation in the states with regard to computer technology has been something of a "patchwork quilt" resulting from efforts to patch the holes in historic privacy statutes. A sampling of the states by John Lautsch revealed that 38 states have computer crime legislation which generally includes the fradulent acquisition of telecommunications services, or tampering with information systems (Lautsch, 1980). Thirty-six states have legislation that expressly regulates the establishment and use of Electronic Funds Transfer (EFT) systems, and some of the other states have administrative regulations framed to regulate off-premises terminals. Thirty-five states have adopted statutes that

regulate their electronic voting systems.

While most states have some common law or judicially created right of privacy, most of these laws are decendent of European Feudal custom introduced as precedent into the colonies, perpetuated after the Revolution and Civil War, and have been integrated into the diverse histories of the 50 states. Thus, today, there are 50 different versions of personal liability called Torts, and the same number of concepts of property ownership. Dan Alpert (1983) argues that these two concepts of law could conceivably be reinterpreted to extend to computer technology. The problem is, as he sees it, that the old common law required theft or fraud as an element of appropriation, and the old property concepts required a physical object to be the subject of ownership. Yet, there are new theories of intellectual property which could be applied to software contents, and Alpert also suggests that modern theories of intrusion by legal means for illegal objects could be included in the old law of Torts.

Other potential issues to be pursued include the theory of negligence on the part of the cable operator for failing to provide adequate protections for the information; this as part of the duty of the operator to the subscriber absent specific legislation. However, as there are no legal standards which adequately define the level of care required of the operator, the amount and type of proof to establish negligence would be extremely difficult to gather at this stage in the development of the law.

Alpert notes that only three states have passed laws specifically aimed at the regulation of cable television in the area of privacy: Illinois, Wisconsin and California. Legislation is reported to be pending in New York and Maryland. Of the 21 states surveyed because they recently awarded cable franchises, only six placed controls on the collection, use or dissemination of information

(Albert, 1983, pp. 8-9). Among the states which have adopted regulations for interactive cable, the general prohibitions include the following (1) divulging the names of subscribers without their consent, (2) disclosing the viewing or behavior habits of the subscriber; (3) using equipment which could visually observe or listen to subscriber homes. In Wisconsin, regulations provide for free installation of a device which controls or prohibits nonconsensual collection of information from the home, and prohibits the cable system from conducting research that requires the response of the subscriber unless the subscriber is notified in advance, and again at regular intervals.

In Maryland and California, regulations will allow operators to divulge the names of subscribers as long as it is possible for subscriers to have their names removed from the list; Maryland will also allow polls to be taken as long as individual resoindents are not easily identifable, or if permission is given to collect such information.

In some states, regulations forbid the retention of individually identifiable information except to the extent necessary for billing and related internal purposes. Subscribers are supposed to have access to this information, as well as rights to correct any misinformation in operator files.

Many of these protections are to be found in Warner Amex's "code of privacy." However, the code, or any of the imitative statutes have yet to be tested in court. And, as Baldwin and McVoy (1983) suggest, subscribers are unlikely to provide "truly informed consent" when they agree to the cable operator's policies regarding data stored in their computers (p. 183).

Individually Identifiable Information

Even the most progressive regulations or legislative proposals, such as

that proposed by Dan Alpert for the District of Columbia, are flawed to the extent that they limit protections to subscribers as individuals. We have noted that there are already innumerable sources of information which allows government agents or marketing firms to identify households and individuals. Government files, such as automobile registrations, voter registration applications and real estate transactions are combined with magazine subscription lists, credit card ratings, catalog shopping records, and the like to provide already detailed identification of individuals. Armed with viewing and purchase information for identifications as gross as the 40 geodemographic clusters identified by Claritas corporation (1983) marketing efforts need only to gather information about the kinds of programs members (as a group) of clusters prefer to view. Such information increases the possibility of targeting promotional messages within suitable editorial environments.

When subpoenaed by the court, Warner-Amex provided information about the extent of viewing of adult movies within a specific community. The data were requested by an adult movie house that wanted to establish that community standards were such that films were already acceptable in the neighborhood. Nash and Smith (1981, pp. 11-12) ask whether the characteization of a community as users of adult films amounts to a loss of privacy by the residents. They suggest that if harm could be shown, such as a change in the community's insurance assessments, a privacy loss might exist.

Whereas there is the potential for filing civil suits in virtually all states for invasions of privacy, with fines ranging from $1,000 in Maryland for intentional invasion up to $50,000 for the first criminal offense in Wisconsin (Alpert, 1983, p. 8) class action suits in the absence of a showing of actual harm would be hard to pursue.

A class action suit is one in which multiple members of a persons having a common interest in a grievance, sue or are sued on behalf of all members in that class. This type of lawsuit is allowed only when considerations of necessity and paramount convenience demonstrate the superiority of this class suit over individual lawsuits. The rules governing such suits are quite constraining. There must be numerous parties for a classaction suit, it must involve questions of common fact and law for the entire group, and the claims or defense of the attorneys must be typical of the general group so that the representation will fairly and adequately protect the interests of the class. A minimum of $100 names plaintiffs are required to bring such an action in federal court. States differ in the minimums they establish, but as long as they can be ascertained, no maximum exists.

Although the consumer class action has been considered an effective method for small claimants in their struggle to seek redress from a giant corporation or a public entity, corporate defendants argue that it is a means of legalized blackmail because many such lawsuits are settled before trail. It has also been argued that class actions always benefit the attorneys for the class rather than the class members.

The Need for Positive Protections

Because people are largely unaware of the ways in which information they generate in their day to day activities is used to bring them under the influence of government and corporate propaganda, they are unlikely to seek redress in the courts. Because the date used in segmentation and targeting efforts has been aggregated from so many different sources and databases, it is virtually impossible for them to identify precisely where the breach occurred. Often, the data have passed through several stages of enhancement in the process of

compiling a specific profile, individual datum no longer exist . Government regulations to date have not provided an answer, in fact:

> official answers seem to offer something for everybody. For datakeeping organizations, the right to gather virtually whatever data they find useful; for subjects of record data, the right to know about and participate in the uses of their information (Rule, et. al., 1980, 1952).

but, the demands for more information continue to grow unabaited.

James Rule and his colleagues suggest that we buy more privacy if we are willing to reduce our ability to discriminate between people. That is, we have laws against discrimination against blacks, against women, against the handicapped, which means that (at least in theory) they must all be treated the same. We have said that we accept the economic loss of efficiency that flows from indiscriminability because we choose instead to retain some higher value. Either our privacy must be that higher value, or we must be guided by a fear of what happens to the value of freedom as the technologies of control continue to develop:

> endless growth in the power and scope of human technologies must not be regarded as a fixed condition of modern social life. Instead, we must view the rise of human powers of control as something which may be altered if thoughtful planning so dictates. And the more sweeping those powers of control, the greater the destruction to result if they should go wrong, the deeper one's skepticism must be (Rule, et. al., 1980, p. 195).

We suggest that it is time to step back and to reflect what we may give up as we reach for the "television of abundance" in this coming information age.

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